

JS-6

UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

**THOMAS E. PEREZ,**  
Secretary of Labor,  
United States Department of Labor,  
  
Plaintiff,  
  
v.

**Case No. CV 13-7116-PA (MRWx)**

**SUNKIST GROWERS, INC.,** a California  
corporation;

**CONSENT JUDGMENT & ORDER**

**SUNKIST RETIREMENT PLAN A (PLAN  
A),** an employee pension benefit plan,

**SUNKIST RETIREMENT PLAN N (PLAN  
N),** an employee pension benefit plan,

**RETIREMENT PLAN FOR HOURLY  
EMPLOYEES OF PRODUCTS GROUP,  
SUNKIST GROWERS, INC. (HOURLY  
PLAN),** an employee pension benefit plan;

**DON DAMES, BILL CHANEY, RICHARD  
FRENCH, RUSS HANLIN, NAZIR KHAN,  
DICK NEECE, CHARLES WOLTMANN,  
MICHAEL WOOTTON,** the individual  
members of the PLAN BOARD OF SUNKIST  
RETIREMENT PLAN, an employee pension  
benefit plan fiduciary;

1 **CLIFF BRADY, BARBARA RATCHFORD,**  
 2 **CHARLES WOLTMANN, DIANE**  
 3 **JOHNSON, CHRISTINE HAGEMANN,** the  
 4 individual members of the  
 5 **ADMINISTRATIVE COMMITTEE TO THE**  
 6 **HOURLY PLAN,** an employee pension benefit  
 7 plan fiduciary;  
 8 and  
 9 **JOHN MCGOVERN,** an individual.  
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 Defendants.

10 Plaintiff THOMAS E. PEREZ, Secretary of Labor, United States Department of  
 11 Labor (the “Secretary”), pursuant to his authority under Sections 502(a)(2) and (5) of the  
 12 Employee Retirement Income Security Act of 1974 (“ERISA”), 29 U.S.C.  
 13 §§ 1132(a)(2) and (5), has filed a Complaint against SUNKIST GROWERS, INC., a  
 14 California corporation (“Company”); SUNKIST RETIREMENT PLAN A, an employee  
 15 pension benefit plan (“Plan A”); SUNKIST RETIREMENT PLAN N, an employee pen-  
 16 sion benefit plan (“Plan N”); RETIREMENT PLAN FOR HOURLY EMPLOYEES OF  
 17 PRODUCTS GROUP SUNKIST GROWERS, INC., an employee pension benefit plan  
 18 (the “Hourly Plan”) (Plan A, N, and the Hourly Plan are collectively referred to as the  
 19 “Plans”); DON DAMES, BILL CHANEY, RICHARD FRENCH, RUSS HANLIN,  
 20 NAZIR KHAN, DICK NEECE, CHARLES WOLTMANN, MICHAEL WOOTTON,  
 21 the individual members of the PLAN BOARD OF SUNKIST RETIREMENT PLAN, an  
 22 employee pension benefit plan fiduciary (“Plan Board”) (the aforementioned individuals  
 23 are collectively referred to as the “Individual Plan Board Members”); CLIFF BRADY,  
 24 BARBARA RATCHFORD, CHARLES WOLTMANN, DIANE JOHNSON,  
 25 CHRISTINE HAGEMANN, the individual members of the ADMINISTRATIVE  
 26 COMMITTEE TO THE HOURLY PLAN, an employee pension benefit plan fiduciary  
 27 (“Administrative Committee”) (the aforementioned individuals are collectively referred  
 28 to as the “Individual Administrative Committee Members”); and JOHN MCGOVERN,

an individual (“McGovern”) (all aforementioned defendants collectively are referred to as “Defendants”).<sup>1</sup>

A. The Secretary, the Company, the Individual Plan Board Members, the Individual Administrative Committee Members, McGovern, and the Plans (collectively, the “Parties”) admit that the Court has jurisdiction over this action pursuant to ERISA Section 502(e)(1), 29 U.S.C. § 1132(e)(1), and that venue lies in the district court for the Central District of California pursuant to ERISA Section 502(e)(2), 29 U.S.C. § 1132(e)(2).

B. The Parties agree to the entry of this Consent Judgment and Order (“Consent Judgment”). The Parties further agree that this Consent Judgment and Order shall fully settle all claims of the Secretary asserted in the Complaint filed in this matter.

C. The Company, the Individual Plan Board Members, the Individual Administrative Committee Members, McGovern, and the Plans acknowledge receipt of the Secretary’s Complaint in this action and hereby waive service of process of the Summons and Complaint.

D. The Parties expressly waive Findings of Fact and Conclusions of Law.

**IT IS HEREBY ORDERED, ADJUDGED, and DECREED that:**

1. Defendants Company, Individual Plan Board Members, Individual Administrative Committee Members, and McGovern are jointly and severally liable for **\$1,620,419.78** in losses caused to the Plans as alleged in the Secretary’s Complaint, and judgment is hereby entered against them in said amount.
2. On or before September 30, 2013, Defendants Company, Individual Plan Board Members, Individual Administrative Committee Members, and McGov-

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<sup>1</sup> The Plans are named as Defendants pursuant to Rule 19(a) of the Federal Rules of Civil Procedure, solely to ensure that complete relief can be granted.

ern shall restore \$1,620,419.78 in Plan losses and lost opportunity income to the Plans in one lump sum payment (“Recovery Amount”). The Recovery Amount shall consist of the following: \$999,569.20 in losses to Plan A for alleged prohibited reimbursements and overpayment of expenses; \$314,546.31 in corresponding lost opportunity income to Plan A; \$117,753.45 in losses to Plan N for alleged prohibited reimbursements and overpayment of expenses; \$37,628.65 in corresponding lost opportunity income to Plan N; \$116,336.35 in losses to the Hourly Plan for alleged prohibited reimbursements and overpayment of expenses; and \$34,585.82 in corresponding lost opportunity income to the Hourly Plan.

3. Defendants Company, Individual Plan Board Members, Individual Administrative Committee Members, and McGovern are permanently enjoined and restrained from violating the provisions of Title I of ERISA, 29 U.S.C. §§ 1001-1191c.
4. Within ten (10) calendar days of payment of the Recovery Amount to the Plans as referenced in Paragraph 2 *supra*, Defendants Company, Individual Plan Board Members, Individual Administrative Committee Members, and McGovern shall provide a copy of the front and back of the remittance check (or other appropriate evidence that payment of the Recovery Amount has been made) to the Regional Director of the United States Department of Labor, Employee Benefits Security Administration (“EBSA”) (“Regional Director”), as specified in Paragraph 6, *infra*.
5. Upon payment of the Recovery Amount by Defendants Company, Individual Plan Board Members, Individual Administrative Committee Members, and McGovern, said Defendants shall be assessed a penalty pursuant to ERISA Section 502(l), 29 U.S.C. § 1132(l), in the amount of twenty (20) percent of the applicable Recovery Amount, or \$324,083.96 (“Penalty Amount”). Defendants Company, Individual Plan Board Members, Individual Administrative

1 Committee Members, and McGovern waive the notice of assessment and ser-  
2 vice requirement of 29 C.F.R. § 2570.83 and, within sixty (60) calendar days  
3 following payment of the Recovery Amount as outlined in Paragraph 2, supra,  
4 Defendants Company, Individual Plan Board Members, Individual Administra-  
5 tive Committee Members, and McGovern shall pay the Penalty Amount to the  
6 United States Department of Labor, by sending a certified or cashier's check  
7 payable to the "United States Department of Labor" (please write "EBSA Case  
8 Nos. 72-032957; -034084; -033781" on the memo line of the check) to:

9 U.S. Department of Labor  
10 ERISA – Civil Penalty  
11 P.O. Box 71360  
12 Philadelphia, PA 19176-1360

- 13 6. Whenever a submission is required to be made to the Regional Director under  
14 the terms of this Consent Judgment and Order, such submission shall be made  
15 to:

16 Regional Director  
17 U.S. Department of Labor  
18 Employee Benefits Security Administration  
19 1055 E. Colorado Blvd., Suite 200  
20 Pasadena, CA 91106-2357  
21 Telephone: (626) 229-1000  
22 Facsimile: (626) 229-1098

- 23 7. In the event of default by Defendants Company, Individual Plan Board Mem-  
24 bers, Individual Administrative Committee Members, and McGovern, the total  
25 balance remaining unpaid shall then become due and payable within ten (10)  
26 calendar days of the default, and interest shall be assessed against such remain-  
27 ing unpaid balance at the rate provided by 28 U.S.C. § 1961 from the date this  
28 Consent Judgment is entered until the total amount is paid in full.

- 1 8. The Company, Individual Plan Board Members, Individual Administrative  
2 Committee Members, and McGovern shall act with respect to the Plans, and to  
3 any other ERISA-covered plan sponsored by the Company, in compliance with  
4 ERISA, this Consent Judgment, and all regulations promulgated by the United  
5 States Department of Labor, including but not limited to any regulations re-  
6 garding the reimbursement of expenses from, or charging of expenses to, the  
7 Plans.
- 8 9. The Company shall not provide services to any Plan without entering into a  
9 written agreement, contract, or letter of understanding (regardless of form,  
10 hereafter referred to as “Contract”) with that Plan. The Contract must be exe-  
11 cuted by the Company and the responsible Plan fiduciaries on behalf of that  
12 Plan, and reviewed and approved by an independent fiduciary (“Independent  
13 Fiduciary”), as specified in Paragraph 14, infra. The Contract shall, at a mini-  
14 mum, contain the following information:
- 15 a. A specification of services covered by the Contract;
  - 16 b. The name of the entity (either the Company or the name of the subsidiary  
17 thereof) that will be performing those services;
  - 18 c. The expenses for which the Company will seek reimbursement when pro-  
19 viding those services, expressed in a manner containing sufficient informa-  
20 tion to enable the responsible Plan fiduciaries to evaluate the reasonable-  
21 ness of the expense reimbursements;
  - 22 d. A provision requiring that the Plan be given sixty (60) calendar days notice  
23 of any material change in the nature of the services being provided;
  - 24 e. A provision listing any third party expenses that will be billed directly to  
25 the Plan and any third party expenses for which the Company will be reim-  
26 bursed by the Plan; and
  - 27 f. Any further information required by 29 C.F.R. § 2550.408b-2.
- 28

- 1 10. Nothing in this Consent Judgment shall be construed as requiring that any  
2 Plan or Plan fiduciaries agree to enter into a Contract with the Company for the  
3 provision of services, or as relieving Plan fiduciaries from the obligation to de-  
4 termine that such a Contract is prudent and otherwise consistent with ERISA.
- 5 11. In the course of providing services to the Plan, the Company shall not receive  
6 funds from that Plan for providing services that are in excess of its direct ex-  
7 penses, as that category of expenses is defined in 29 C.F.R. § 2550.408c-  
8 2(b)(3). Nothing in this Consent Judgment shall relieve the Company of any  
9 liability resulting from its charging an amount to a Plan in excess of its direct  
10 expenses.
- 11 12. The Company may only be reimbursed from the Plans for expenses if: (a) the  
12 expense is a direct expense, as that category is defined in 29 C.F.R.  
13 § 2550.408c-2(b)(3); (b) the Company's records show that the expense was in-  
14 curred solely for the benefit of the Plans; (c) the expense is necessary for the  
15 establishment or operation of the Plans; (d) the expense is charged pursuant to  
16 a contract or arrangement which is reasonable; (e) the expense is reasonable  
17 and does not exceed the amount that would have been incurred by using third  
18 parties at market rates; (f) the Independent Fiduciary, as specified in Paragraph  
19 14, infra, has determined that it is prudent to use the Company as a service  
20 provider with respect to the particular services for which reimbursement is  
21 sought; (g) the expense does not exceed the actual costs incurred by the Com-  
22 pany in rendering the service to each Plan; and (h) the expense is consistent  
23 with ERISA and relevant regulations. Moreover, the Company shall not calcu-  
24 late the reimbursement amount based upon a per-participant fee, percentage of  
25 Plan assets, or any other method that does not track its actual costs.
- 26 13. Subject to the Independent Fiduciary's approval, as specified in Paragraph 14,  
27 infra, the Company may receive reimbursements from a Plan for the salaries  
28 and fringe benefits of those employees whose responsibilities consist solely of



1 performing work on behalf of one or more Plans (the “100% Plan Employ-  
2 ees”), subject to the use of an approved allocation method for dividing those  
3 reimbursements among the Plans (“Shared Expenses”). Shared Expenses shall  
4 be allocated among the Plans based on a methodology established by the Inde-  
5 pendent Fiduciary and approved by Plan fiduciaries for each applicable Plan.

6 14. Should the Company wish to seek reimbursement from the Plans for purported  
7 direct expenses, the Company shall retain an independent fiduciary (“Inde-  
8 pendent Fiduciary”), who is qualified by education, experience, and training  
9 with a particular expertise in the fiduciary duties imposed by ERISA and em-  
10 ployee benefit plan administration and management. Prior to retaining an In-  
11 dependent Fiduciary, the Company shall first provide the Regional Director  
12 with the name and credentials of the proposed Independent Fiduciary. The  
13 Regional Director shall have thirty (30) calendar days from the date of receipt  
14 of the name and credentials of the proposed Independent Fiduciary to provide a  
15 written objection to the Company. The lack of an objection by the Regional  
16 Director shall not relieve the Independent Fiduciary or the Company of their  
17 fiduciary obligations under ERISA. The scope of the Independent Fiduciary’s  
18 duties shall include:

- 19 a. Determining, as often as prudent and required by ERISA during his period  
20 of service to the Plans, whether the use of the Company to provide adminis-  
21 trative services to the Plan is prudent and reasonable in light of the quality  
22 and cost of the services;
- 23 b. Approving administrative service agreements between the Company and  
24 each Plan;
- 25 c. Approving invoices and any contemplated payments between the Company  
26 and each Plan;
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- 1 d. Determining categories of direct expenses for which the Company may  
2 charge a Plan and the methods of calculating such direct expenses necessary  
3 to comply with the terms of this Consent Judgment (“Expense Methods”);  
4 e. Using prudent methods to monitor the Company’s compliance with the Ex-  
5 pense Methods;  
6 f. If, in the course of performing his duties under this Consent Judgment, the  
7 Independent Fiduciary determines that the Company is not in compliance  
8 with the Consent Judgment, taking whatever action is necessary under  
9 ERISA to obtain the Company’s compliance.
- 10 15. The scope of the Independent Fiduciary’s duties, and this Consent Judgment,  
11 shall be construed to:  
12 a. apply to, and include, any assets of the Plans paid by the Plans to the Com-  
13 pany that are determined under this Consent Judgment to be chargeable to a  
14 Plan, but  
15 b. not apply to, and exclude (i) any services provided by the Company to a  
16 Plan that are not paid or reimbursed by a Plan to the Company, including  
17 but not limited to any expenses incurred by the Company that are not  
18 charged to a Plan, or (ii) any expenses that are paid to the Company by a  
19 Plan in accordance with an approved individual exemption.
- 20 16. The Independent Fiduciary, as specified in Paragraph 14, supra, shall be enti-  
21 tled to reasonable compensation, fees and expenses, which amounts may not be  
22 paid from the assets of the Plans.
- 23 17. Should an Independent Fiduciary be retained, as specified in Paragraph 14,  
24 supra, the Company and Independent Fiduciary shall provide the Regional Di-  
25 rector with status updates setting forth the Independent Fiduciary’s activities  
26 and findings with respect to the Plans and shall include, as applicable: (a) a list  
27 and description of all Expense Methods approved by the Independent Fiduci-  
28 ary; (b) a list of all payments made by each Plan to the Company or charged

1 directly to each Plan pursuant to this Consent Judgment, including the date on  
2 which each payment was made; (c) documents, including but not limited to in-  
3 voices, supporting the aforementioned payments (“Status Updates”). In the  
4 event the Company and the Independent Fiduciary are unable to agree upon an  
5 Expense Method or the application of an Expense Method, the Company and  
6 Independent Fiduciary shall promptly notify the Regional Director.

7 18. The Company and Independent Fiduciary shall provide the Regional Director  
8 with a Status Update within six (6) months of the Independent Fiduciary’s re-  
9 tention. A further Status Update shall be provided to the Regional Director  
10 within one (1) year of the Independent Fiduciary’s retention. Thereafter, the  
11 Company and Independent Fiduciary shall make Status Updates available to  
12 the Regional Director upon written request.

13 19. Upon review of the Status Update, as specified in Paragraphs 17 and 18, su-  
14 pra, EBSA shall make best efforts to notify the Company and/or Independent  
15 Fiduciary of potential noncompliance concerns before the due date of the fur-  
16 ther Status Update. The Company shall respond as soon as administratively  
17 practicable and, as appropriate, have an opportunity to correct any items identi-  
18 fied by EBSA within a reasonable period of time. EBSA’s failure to notify the  
19 Company and/or the Independent Fiduciary of any potential noncompliance  
20 concerns shall not constitute, in any manner, a waiver of EBSA’s right to in-  
21 vestigate or bring an enforcement action as a result of any party’s noncompli-  
22 ance with this Consent Judgment or ERISA.

23 20. Defendants Company, Individual Plan Board Members, Individual Adminis-  
24 trative Committee Members, and McGovern each expressly waive any and all  
25 claims of any nature which they may have against the Secretary, the United  
26 States Department of Labor, or any of its officers, agents, attorneys, employees  
27 or representatives, arising out of, or in connection with, the allegations con-  
28 tained in the Complaint on file in this action, any other proceedings or investi-

1           gation incident thereto, or based on the Equal Access to Justice Act, as amend-  
2           ed.

3           21. The Secretary and all Defendants shall each bear their own costs, expenses,  
4           and attorney's fees incurred to date in connection with any stage of this pro-  
5           ceeding, including but not limited to attorney's fees which may be available  
6           under the Equal Access to Justice Act, as amended.

7           22. Nothing in this Consent Judgment and Order is binding on any governmental  
8           agency other than the United States Department of Labor, Employee Benefits  
9           Security Administration.

10          23. This Court retains jurisdiction of this action for purposes of enforcing compli-  
11          ance with the terms of this Consent Judgment and Order.


12          24. By signing their names to this Consent Judgment and Order, the Parties each  
13          represent that they are informed and understand the effect and purpose of this  
14          Consent Judgment and Order.

15          25. Any person signing this Consent Judgment and Order on behalf of a party ex-  
16          pressly acknowledges and represents that he or she has the authority to sign  
17          for, and legally bind, that party.

18          26. This Consent Judgment and Order may be executed in counterparts, each of  
19          which shall be deemed to be an original, but all of which, taken together, shall  
20          constitute one and the same instrument.

1 The Court directs the entry of this Consent Judgment and Order as a final order.  
2 IT IS SO ORDERED.

3  
4 Dated: October 18, 2013

5   
United States District Judge

1 Entry of this Consent Judgment and Order is hereby consented to:  
2

3 Dated: September 30, 2013

M. PATRICIA SMITH  
Solicitor of Labor

JANET M. HEROLD  
Regional Solicitor

DANIELLE L. JABERG  
Counsel for ERISA

9 \_\_\_\_\_/s/ \_\_\_\_\_  
10 GRACE A. KIM  
11 Trial Attorney  
12 Attorneys for Secretary of Labor

13  
14 Dated: September 23, 2013

\_\_\_\_\_ /s/ \_\_\_\_\_  
For Sunkist Growers, Inc.

16 By: Charles L. Woltmann, Sr. VP., Law +  
17 Gen'l Counsel  
18 (Print name)

19 Dated: Sept. 23, 2013

\_\_\_\_\_ /s/ \_\_\_\_\_  
For Sunkist Retirement Plan A

22 By: Kellee Nelson, Plan Administrator  
23 (Print name)

24  
25 Dated: Sept. 23, 2013

\_\_\_\_\_ /s/ \_\_\_\_\_  
For Sunkist Retirement Plan N

27 By: Kellee Nelson, Plan Administrator  
28 (Print name)

1 Dated: Sept. 23, 2013

\_\_\_\_/s/ \_\_\_\_\_

2 For Retirement Plan for Hourly Employees  
3 of Products Group, Sunkist Growers, Inc.

4  
5 By: Kellee Nelson, Plan Administrator  
6 (Print name)

7 Individual Plan Board Members:

8  
9 Dated: 09/22/13

\_\_\_\_/s/ \_\_\_\_\_

10 Don Dames

11 Dated: 9-24-13

\_\_\_\_/s/ \_\_\_\_\_

12 Bill Chaney

13  
14 Dated: 9-30-13

\_\_\_\_/s/ \_\_\_\_\_

15 Richard French

16  
17 Dated: 9-23-13

\_\_\_\_/s/ \_\_\_\_\_

18 Russ Hanlin

19 Dated: Sept. 21<sup>st</sup>/ 2013

\_\_\_\_/s/ \_\_\_\_\_

20 Nazir Khan

21 Dated: 9/24/13

\_\_\_\_/s/ \_\_\_\_\_

22 Dick Neece

23  
24 Dated: September 23, 2013

\_\_\_\_/s/ \_\_\_\_\_

25 Charles Woltmann

26 Dated: September 23, 2013

\_\_\_\_/s/ \_\_\_\_\_

27 Michael Wootton  
28

1 Individual Administrative Committee Members:

2  
3 Dated: 9/21/13

\_\_\_\_/s/ \_\_\_\_\_

4 Cliff Brady

5 Dated: 9/23/13

\_\_\_\_/s/ \_\_\_\_\_

6 Barbara Ratchford

7  
8 Dated: September 23, 2013

\_\_\_\_/s/ \_\_\_\_\_

9 Charles Woltmann

10 Dated: 24 Sept. 2013

\_\_\_\_/s/ \_\_\_\_\_

11 Diane Johnson

12 Dated: 9/26/13

\_\_\_\_/s/ \_\_\_\_\_

13 Christine Hagemann

14  
15  
16  
17  
18 Dated: 9/30/13

\_\_\_\_/s/ \_\_\_\_\_

19 John McGovern

20  
21  
22  
23 This Consent Judgment is approved as to form by:

24  
25 Dated: 9/30/13

\_\_\_\_/s/ \_\_\_\_\_

26 Nicholas J. Waddles

27 Seyfarth Shaw, LLP

28 Attorney for Defendants